IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.235 OF 1990.

Nalini Madhukar Bangar
and another. .. Appellant.

V/s.

Raghunath Sadhu Bankhele
since deceased by his heirs
Gulabbai Subhash Jadhav & Ors. .. Respondents.

Mr.A.V.Anturkar, Advocate for the Appellant

Ms. Asha Bhambani, Advocate for Respondent no.3.

CORAM : S.R. SATHE, J.

DATED : 16TH AUGUST, 2004.

JUDGMENT :

1. Being aggrieved by the judgment and order passed by the Court of 5th Additional District Judge, Pune, in Regular Civil Appeal No.665 of 1998 whereby the order passed by the Court of Joint C.J.J.D, Pune in Special Civil Suit No.45 of 1982 refusing the claim of plaintiffs for specific performance was confirmed and the defendants Nos.1A and 1B were directed to return the earnest amount of Rs.5,000/- (Rupees Five Thousand Only) to plaintiff with interest, plaintiffs have preferred this appeal. (for the sake of convenience, hereafter the parties

are referred to as Plaintiffs and Defendants)

2. The brief facts giving rise to this appeal are as under:

. The suit land bearing survey no,.100/9 admeasuring 13 Ares situated at village Manchar, Taluka: Ambegaon, District:Pune, described in detail in para 1 of the plaint was owned by the original defendant no.1 Rangnath and his nephew Balu i.e. defendant no.2. They agreed to sell the suit land to the plaintiffs for consideration of Rs.39,000/- and after accepting Rs.5,000/-, executed the agreement to sale on 1.9.1980. Infact, on the date 9of execution of the agreement to sale, defendant no.2 was not available, hence he executed the consent deed on 11.1.1982. On the date of the agreement to sale plaintiff was also put in possession of the suit land. As per the terms and conditions of the agreement the defendants were to obtain the necessary permission from the revenue authorities and to execute the sale deed within 11 months from the date of agreement. Though the period of 11 months was over, the plaintiffs did not take any steps and show

willingness to get the sale deed executed. The defendant no.1 therefore issued notice through advocate on 10.2.1981 to the plaintiffs and called upon them to get the sale deed executed within 8 days. The plaintiffs gave reply to the said notice and informed that the defendant No.1 should keep Balu i.e. Defendant no.2 present and execute the sale deed. Inspite of this the sale deed was not executed. The plaintiff therefore filed a suit bearing Special Civil Suit No.45 of 1982 on 25.1.1982 in the Court of Civil Judge, Senior Division, Pune and prayed for specific performance of the agreement to sale and also for perpetual injunction against the defendants restraining them from obstructing plaintiffs possession of the suit land.

. The defendant no.1 filed his written statement exhibit 11 and denied to have executed any agreement to sale and having put the plaintiffs in possession of the suit land. He contended that the land in question has been sold to defendant No.3 by virtue of the sale deed dated 11.1.1982. He, therefore, prayed for dismissal of the suit. The defendant No.2 also filed written statement and

admitted that he has executed the consent deed in favour of the plaintiff. The defendant nos.1 and 2 had already executed the agreement in favour of defendant no.3 and subsequently in pursuance of the same they executed the sale deed and even handed over the possession and as such the plaintiffs are not entitled to get any relief as claimed. He, therefore, prayed for dismissal of the suit.

. On the above mentioned pleadings the trial court framed issues at exhibit 31. After considering the evidence adduced by both the parties, the trial court came to the conclusion that the defendant No.1 alone was the owner of the suit land and he had executed the agreement to sale. He however held that the plaintiffs failed to prove that they were and are ready and willing to perform their part of the contract. He also held that there was no evidence to show that plaintiffs were actually put in possession. According to trial court the defendant No.3 had infact acquired valid title by virtue of sale deed dated 11.1.1982. Hence the trial court dismissed the plaintiffs suit.

. Being aggrieved by the above referred order the plaintiffs filed Civil Appeal in District Court, Pune. The first appellate court held that there was no sufficient evidence to show that agreement and sale deed have been executed in favour of defendant No.3 by defendants 1 and 2. He however held that the plaintiffs have failed to [prove that they were and are ready and willing to perform their part of the contract. He also held that the plaintiff was in possession of the suit land. He, however, dismissed the plaintiffs appeal and directed the defendant Nos.1A and 1B to return the earnest amount of Rs.5000/- with interest.

3. As the first appeal was dismissed, the plaintiffs filed the present appeal. At the time of admission on 6.4.1990, this Court observed :

> . "The following substantial questions of law arise in the Second Appeal.
>
> (A) Whether the observations by the Learned Judge that the Plaintiff has not paid the balance amount nor deposited the same in the Court and he has also not shown the plaint and also in his evidence that he offered the balance to the Defendants and there is nothing in his evidence that he is still ready and willing to perform the part

of the contract? Whether these observations are actually contrary to what has been stated on record and therefore, perverse?

(B) That it is necessary in a suit for specific performance that the remaining amount of the agreement specific performance of which is sought has to be deposited in the Court and if no such deposit is made, then whether the same if fatal to the plaintiffs?

(C) Whether the Appeal Court was right in holding that the plaintiffs do not have the funds to deposit the amount, when the financial position of the plaintiffs is actually not disputed by the Defendants? Whether if the permission is necessary under the M.R.P.D.P.Act, the proper course for the learned Lower Court was to appoint the Commissioner and direct to bring the permission and execute the sale deed in favour of the plaintiffs following the judgment of this Honourable Court in Sou. Shantabai V/s. Manikchand reported in AIR 1988Bombay, page 82.

(D) Whether after having observed that the facts of the above mentioned case, namely the case of Sou. Shantabai vs. Manikchand, reported in AIR 1988, Bombay page 82 are similar to the facts of the instant case, whether the learned Additional Judge was justified in not following the same?

(E) Whether the learned Additional District Judge was right, after having come to the conclusion that the plaintiffs are in possession of the suit property, and the possession of the Plaintiffs is settled possession not to give the injunction in favour of the Plaintiff for the purpose of protecting their interest."

4. Though the above mentioned questions of law

were formulated, Shri Anturkar, learned advocate for the plaintiffs has restricted his argument only on the point of plaintiffs readiness and willingness to perform his part of contract by submitting that the finding recorded by the first appellate court to the effect that the plaintiffs were not ready and willing to perform their part of contract was contrary to what has been stated on record and as such perverse. According to him, the reasons given by the first appellate court for coming to the conclusion that plaintiffs were not ready and willing to perform their part of the contract are totally wrong. As against this, the learned advocate for the defendant No.3 submitted that no question of law, much less substantial question of law is involved in this appeal. According to her the question as to whether the plaintiffs were and are ready and willing to perform their part of the contract cannot be regarded as substantial question of law. For that purpose she has placed reliance on a case, Veerayee Ammal v. Seeni Ammal (2002) 1 SCC 134.

5. Shri Anturkar argued before me that the first appellate court has observed that the plaintiff

should have insisted the defendant nos.1 and 2 to seek necessary permission from the revenue authorities and as he failed to do so, it shows that the plaintiffs were infact not willing to perform their part of contract, but if we peruse the agreement in question it appears that the responsibility of seeking necessary permission was infact of the defendant Nos.1 and 2 and as such reasoning given by the lower appellate court is incorrect. From the perusal of the agreement in question it is clear that the responsibility or duty was of the defendant to submit the application for seeking the necessary permission from the revenue authorities. So, merely because the plaintiffs did not insist the defendants to apply and seek the permission early, one cannot jump to the conclusion that plaintiffs were not ready and willing to perform their part of the contract. The first appellate court has also observed that the plaintiffs were not justified in asking defendant no.1 to bring defendant no.2 and then execute the sale deed and this they did only with a view to avoid to get the sale deed executed. These observations cannot be said to be correct. Admittedly, the agreement to sale was to be

executed by defendants Nos.1 and 2. Accordingly, their names were also included in the said agreement. However, at the time of execution defendant No.2 was not available and as such only defendant no.1 signed the said agreement. However, admittedly, thereafter on 18.12.1981 the defendant no.2 who is the nephew of defendant no.1 and whose name was also appearing in the record of rights in respect of the suit property executed consent deed in favour of the plaintiffs and said that after the permission they will execute the sale deed. So, in such circumstances it cannot be said that the action of the plaintiffs asking defendant No.1 to bring defendant No.2 and to execute sale deed was not justified. Such conduct of plaintiffs was not sufficient to indicate that the plaintiffs were not ready and willing to perform their part of the contract.

6. From the perusal of the judgment of the first appellate court it appears that the court was of the view that the plaintiffs should have deposited the balance consideration of Rs.34,000/- in the court, but as he did not deposit the same it was held that plaintiffs were not ready and willing to perform

their part of the contract. Law on this point is very clear. It is well settled that in order to show the readiness and willingness in a suit for specific performance of agreement to sale filed by the transferee, it is not necessary for him to deposit the balance consideration amount. Ofcourse, if the court directs he has to deposit the same, but merely because such amount is not deposited, no conclusion can be drawn that plaintiff was and is not ready and willing to perform his part of the contract.

7. From the above discussion it is clear that the reasons given by the first appellate court while coming to the conclusion that plaintiffs were not ready and willing to perform their part of the contract are not legal and correct. However, at the same time it must be noted that appellate court has not taken into consideration only the above mentioned three circumstances, but has considered all other facts, circumstances and the conduct of the plaintiffs and then it has reached to the conclusion that plaintiffs failed to prove that they were and are ready and willing to perform their part of the contract.

8. It is pertinent to note that in the instant case, the agreement to sale was executed on 1.9.1980. The sale deed was to be executed within 11 months from the said date i.e. sometime in August 1981. Though there was stipulation that defendant Nos.1 and 2 should obtain the necessary permission from the revenue authority, it does appear that there was infact no necessity to obtain such permission. Besides, having regard to the fact that eleven months period was prescribed for execution of the sale deed, if really the plaintiffs would have been ready and wiling to perform their part of the contract and get the sale deed executed, then certainly, atleast at the end of the said period plaintiffs should have asked the defendant Nos.1 and 2 to execute the sale deed. However, in the instant case admittedly at no point of time plaintiffs asked the defendants to execute the sale deed by informing that they are ready to pay the balance consideration amount. On the contrary, we find that it was defendant No.1 who first issued notice to plaintiffs and reminded them of the agreement executed and asked them to get the sale deed executed within a period of about eight

days by paying the balance consideration amount. After receipt of the notice also though the plaintiffs said that they wil pay the amount, they actually did not take any active step in that behalf and thereafter filed the present suit. Though it is true that the defendant had never expressed that plaintiff was not in a position to pay the balance amount, they have also not adduced any evidence to show that they were ready with the balance consideration. At the last moment, an attempt was made on behalf of the plaintiffs to show that they are having sufficient amount in their bank. However, the extracts of bank account produced at exhibit 78 go to show that at the material time i.e. during the period of first 11 months and even on the date of filing the suit, the plaintiffs were not having sufficient amount in their said account. So, considering all these aspects both the courts below have recorded the finding that plaintiffs have failed to prove that they were and are ready and willing to perform their part of contract.

8. It is needless to say that the scope of second appeal is very limited. In Varayee Ammal vs.

Seeni Ammal (2002) 1 SCC 134 the Apex court has specifically observed "the question framed by the High Court as to whether the appellant plaintiff has established that she was always ready and willing to perform her part of contract cannot, in any way, be termed to be a question of law much less a substantial question of law. The question formulated in fact is a question of fact. Merely because of appreciation of evidence another view is also possible would not clothe the High Court to assume the jurisdiction by terming the question, as a substantial question of law." So, in view of these observations it has to be held that in the present appeal there is no substantial question of law and as such the appeal cannot be entertained. Even if we assume for the sake of argument that some of the reasoning given by the first appellate court for holding that plaintiffs were not ready and willing to perform their part of contract is incorrect, still it cannot be said that the final conclusion arrived by the said court is incorrect. On the contrary, we find that both the courts below have taken into consideration all the facts, circumstances and conduct of the parties and have reached to the

conclusion that plaintiffs were not ready and willing to perform their part of the contract. In the case of Kondiba Dagdu Kadam vs. Savitribai Sopan Gujar and others (1999) 3 SCC 722 the Apex Court has observed that High Court cannot substitute its own opinion for that of the first appellate court unless it finds that the conclusions drawn by the lower court were erroneous being (1) contrary to the mandatory provisions of applicable law; or (2) contrary to the law as pronounced by the Apex Court or based upon inadmissible evidence or no evidence. In the instant case it cannot be said that the plaintiff's case falls in any of the above mentioned three categories. So this is not a fit case to interfere with the finding of the first appellate court.

. In this view of the matter, there is no substance in this appeal. Appeal is dismissed with costs.

. Parties to act on the copy of this order duly authenticated by the Court Shirestedar.

(S.R.Sathe, J.)